Appeal No. UKEAT/0412/14/DA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 30 April 2015

Before

THE HONOURABLE MRS JUSTICE SLADE

MS G MILLS CBE

MR J R RIVERS CBE

SECRETARY OF STATE FOR JUSTICE — APPELLANT

MS S A PROSPERE — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MISS CLAIRE DARWIN (of Counsel) Instructed by: Government Legal Department Team E2 One Kemble Street London WC2B 4TS
For the Respondent	MR ALEX JUST (of Counsel) Instructed by: Collyer Bristow LLP Solicitors 4 Bedford Row London WC1R 4TF

SUMMARY

DISABILITY DISCRIMINATION

Reasonable adjustments

Section 15

The Employment Tribunal erred in failing to decide the disability discrimination and reasonable adjustments claims on the basis of the Provision, Criterion or Practice which it identified in the list of issues. Further, the Employment Tribunal erred in failing to make the necessary findings of fact or set out its reasoning in deciding that the Respondent's policies were not a proportionate means of achieving the aim, which they held to be legitimate, of managing absence and dealing with attendance consistently under one policy. The Employment Tribunal erred in the same way in deciding that the Respondent did not make a reasonable adjustment to its policy on managing attendance. **Hardy & Hansons plc v Lax** [2005] ICR 1565 applied. See also **Akerman-Livingstone v Aster Communities Ltd** [2015] 2 WLR 721 paragraph 28.

THE HONOURABLE MRS JUSTICE SLADE

1. The Secretary of State for Justice, the Respondent, appeals from the Decision of an Employment Tribunal (Employment Judge Baty and members), sent to the parties on 19 May 2014, that the Claimant's complaints of a failure to make reasonable adjustments and of discrimination arising from disability both succeed. The Claimant works at East London Employment Tribunal at Anchorage House, London E14. Her employment commenced in February 2002. The Claimant stated in her ET1 that she was diagnosed with deep vein thrombosis in March 2011. She had a period of absence from work of 52 days in 2011 and 20 consecutive working days in 2013.

2. The Respondent operates a Management Attendance Policy ("MAP"). It was before us and before the Employment Tribunal. The MAP provides for disability leave, absence and attendance for those with rehabilitation assessment or treatment requirements. Such leave is stated to be a form of special leave with pay for team members with disabilities for the specific purpose of assessment, treatment or rehabilitation. It should be recorded as disability leave. Disability leave is usually agreed in advance. In paragraph 55 of their Judgment, the Employment Tribunal held:

> **"55. Other than Disability Leave, all other sickness absence, whether it is for a reason related to a disability within the meaning of the Act or not, is considered as sickness absence and managed under the MAP."**

Absence related to disability which is not for assessment, treatment or rehabilitation is therefore treated as sickness absence and dealt with under the Respondent's procedure.

3. The Employment Tribunal held at paragraph 56:

> **"56. The MAP notes provisions regarding reasonable adjustments. In addition the Ability Manual states:**

> **"A person with a disability, may as a consequence of the disability, have more sick absence than a non-disabled person. It therefore may be necessary to consider making reasonable adjustments in order to vary the application of the Managing Attendance procedures in order to recognise this. This should only be considered after advice has been sought from HR shared services and/or the Occupational Health Service provider.**
>
> **…**
>
> **A member of staff with a disability who may have absence issues that relate to the disability should not be subject to a warning until advice is received from ATOS and/or HR Shared Services or any reasonable adjustments have been put in place. It is essential therefore that a line manager consults HR shared services and/or the occupational health service provider before taking action." "**

4. The MAP divides sickness absence into two categories: short-term and long-term sickness absence. There was some doubt as to the category into which 20 days' absence fell. The Claimant's 20 days' absence in 2013 was dealt with under the short-term absence provisions. The short-term absence procedure, as set out in MAP, provides for the following steps which are set out in the text and in a flowchart. First, there is to be a return to work meeting. This has been described by Miss Darwin, counsel for the Respondent, as an informal, relatively short meeting. The text of MAP, so far as the return to work meeting is concerned, includes a consideration whether or not to refer the case to Occupational Health. The policy continues: "Where there is concern over an employee's attendance, the manager will arrange an attendance review meeting". This is a formal meeting at which the employee may be represented. A warning may be given as a result of that meeting. The employee can appeal against the conclusion reached in that meeting.

5. The MAP procedure also refers to case conference. A manager has the option to consider holding a case conference before arranging an attendance review meeting or making a referral to Occupational Health.

6. In this case the Claimant was invited to an ARM (attendance review meeting) in 2011, a year in which she had 52 days' absence. She received a standard form letter inviting her to the

meeting, which gave rise to the possibility of receiving a warning. No written warning was in fact issued in 2011. After her absence in 2013, the Claimant returned to work on 24 April 2013. A return to work interview was held. The Claimant was told by her manager that the number of days' absence was a cause for concern. The Claimant was referred to Occupational Health advisers, ATOS, who produced a report on 7 May 2013. They referred to a disability suffered by the Claimant. The Employment Tribunal found, in paragraph 61:

> **"61. Up until this point, the Respondent was not aware that the reasons for the Claimant's absence in 2013 were connected to her being a disabled person for the purposes of the act, nor was it aware that her previous absence in 2011 could have been related to a disability."**

The disability was deep vein thrombosis ("DVT").

7. On 23 May 2013, the Claimant was invited to an ARM meeting. The letter inviting her to such a meeting informed her that a warning could be given at that meeting. At the ARM meeting on 30 May 2013, the Claimant was accompanied by a colleague. There were discussions about adjustments which may be needed. A manager indicated that the Claimant should apply to have her leave reclassified as disability leave. On 27 June 2013, the Claimant gave a list of dates which she thought were, and sought to have them reclassified as, disability leave. Nine working days were agreed by the Respondents to be so classified. The ARM meeting was reconvened on 19 July 2013. In an outcome letter of 24 July 2013, the Claimant was told that she was treated as having nine days of disability leave and eleven disability-related absence days. She was told that she would not be given a warning.

8. The Employment Tribunal held at paragraph 73 that although the disability-related absence was treated as sickness absence, the classification may affect how the manager exercises his or her discretion under the MAP, for example as to whether or not to issue a written warning.

9. The Claimant brought proceedings in the Employment Tribunal on 26 July 2013. In her ET1 she stated:

> **"I wish to claim Disability Discrimination by failure to make reasonable adjustments. The provision criterion or practice the Respondent has failed to adjust is the Managing Attendance Policy.**
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> **A reasonable adjustment to the Managing Attendance Policy would be to discount all or some of my Disability Related Absence. I have been informed by my manager that my Disability Related Absence is being [treated] the same as Sickness Related Absence for non Disability related reasons.**
>
> **This has caused me to be subject to an Attendance Review Meeting and the threat of a written warning whether my absence relates to my disability or not."**

10. In a statement made on 26 March 2014, the Claimant wrote at paragraph 32:

> **"The reasonable adjustment I am requesting is to have some or all of my Disability Sick leave discounted (page 47 of the Managing Attendance Policy (Disability leave)[)] and my disability sick leave not to run concurrent with normal sick leave as part of my reasonable adjustments."**

We were told by Mr Just, the Claimant's counsel, that it is the first part of that sentence which is material to our considerations.

11. The Employment Tribunal that recorded as having that the issues agreed with counsel were as follows:

> **"*Reasonable adjustments***
>
> **(b) Did the Respondent operate a provision, criterion or practice (PCP) that put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who do not share her disability? The PCP relied on is that the Respondent treated disability-related absence no differently from other sickness absence for the purposes of the Respondent's Management Attendance Policy (MAP) and associated documentation.**
>
> **(c) The disadvantage relied on is that the Claimant became subject to an attendance review meeting (ARM) and the threat of a written warning.**
>
> **(d) The judge stated that the reasonable adjustment relied on by the Claimant appeared to be the discounting of all or some of her disability-related absence, which could have an impact on the way the Claimant was treated under the policy. Miss Lewis initially indicated that that was part of it but also indicated that it was really about an adjustment to the policy or its application generally such that the Claimant, in respect of long periods of disability-related absence, would not effectively automatically be subjected to an ARM and the consequent threat of a written warning. The Claimant was not suggesting that the Respondent should always discount all periods of disability-related absence in the application of its policy generally.**
>
> **(e) Did the Respondent fail to comply with a duty to make such a reasonable adjustment?"**

12. Counsel prepared a note in clarification of the Claimant's case. That appears to have been made on the first day of the hearing, 25 March 2014. Counsel wrote under the heading of "The Claim":

> **"5. The Claimant's claim is that the Respondent has failed in its duty to make reasonable adjustments where she, a disabled employee, is placed at a "substantial disadvantage" as a result of a provision, criterion or [practice] ("PCP"). In this case, the PCP is the MOJ Managing Attendance policy ("MAP") …**
>
> **6. The MAP distinguishes between 'Disability Leave' and 'Disability-related sick leave'.**
>
> **7. Where Disability Leave is defined as leave that a disabled employee can take in order to manage their condition, Disability-related sick leave is treated identically to normal sick leave. This results in periods of Disability-related sick leave triggering the same process of meetings and investigations (such as an Attendance Review Meeting ("ARM")) as if a person with no disability took a prolonged and unexplained period of absence."**

13. In the "Submissions" section at paragraph 11(b), counsel wrote:

> **"Following her most recent absence, the Claimant ought to have had a case conference to discuss her disability and any related absence with her management, rather than an ARM (which carried a possible outcome of sanction)"**

The Claims Brought by the Claimant

14. Two claims under the **Equality Act 2010** were brought: one was pursuant to the **Equality Act** section 15. Section 15 provides in material part as follows:

> **"15.** ***Discrimination arising from disability***
>
> **(1) A person (A) discriminates against a disabled person (B) if -**
>
> > **(a) A treats B unfavourably because of something arising in consequence of B's disability, and**
> >
> > **(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim."**

15. The Claimant also brought a claim that the Respondent had failed in its duty to make reasonable adjustments. Section 20 provides in material part as follows:

> **"(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.**
>
> **(2) The duty comprises the following three requirements.**
>
> **(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison**

with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage."

16. Although Miss Darwin for the Respondent developed a number of grounds of appeal, it was apparent as the hearing progressed that there are two issues raised on appeal which are logically prior to the others and which are determinative. The first is whether the Employment Tribunal decided the case without properly defining the PCP at issue or by not considering the PCP identified in the list of issues. Secondly, in deciding under the **Equality Act**, section 15(1)(b), whether the application of the PCP was a proportionate means of achieving a legitimate aim and under section 20 whether the Respondent had taken such steps as reasonable to avoid the substantial disadvantage caused by the application of the PCP whether the Employment Tribunal failed to carry out the necessary balancing exercise required by both provisions.

The PCP

17. In paragraph 78 of the Judgment, the Employment Tribunal held:

> **"78. … In particular, although we found that under the terms of the policy it was possible to arrange a case conference before arranging an ARM, we found that, at Anchorage House at least, there was a policy of arranging an ARM without having a case conference first. That is the PCP that was applied and it was applied to all sickness absence, regardless of whether it was disability-related."**

18. Counsel contended that the Employment Tribunal did not consider the PCP recorded in the list of issues set out in paragraph 5(b) of the Judgment. If it had then there would have been no need to clarify in paragraph 78 that the PCP was applied "to all sickness absence, regardless of whether it was disability-related". Further, it is said that the Employment Tribunal appears to have accepted, at paragraph 9 of their Reconsideration Decision, that there was a PCP of holding attendance review meetings. Rather than this being an exemplification of the PCP of not treating disability-related absence and sickness absence differently as the Employment

Tribunal suggested, in reality this was a discrete complaint about how the Respondent applies its Management Attendance Policy in practice and it is said that that was not the PCP identified in the list of issues at the start of the Tribunal's Judgment.

19. Further, Miss Darwin contended, that in any event the PCP outlined by the Tribunal in paragraph 78 of its Judgment makes no sense having regard to the substantial disadvantage relied upon by the Claimant being that she became subject to attendance review meetings. It is trite law to say that, in order for the duty to make reasonable adjustments to arise, a PCP must put a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with non-disabled persons. It is said that attendance review meetings cannot be both the substantial disadvantage and the PCP. Accordingly, it is said, the Employment Tribunal erred in failing to determine the claim by way of reference to the PCP it had notified the parties at the start of the hearing. Alternatively, the Employment Tribunal erred by determining the claim by way of reference to an exemplification of the PCP and not the identified PCP.

20. Mr Just for the Claimant contended that the Claimant's ET1 embraced the way in which the Tribunal dealt with the question of what the PCP was. He relies on the following passage:

> **"… The provision criterion or practice the Respondent has failed to adjust is the Managing Attendance Policy.**
>
> **…**
>
> **This has caused me to be subject to an Attendance Review Meeting and the threat of a written warning …"**

21. Mr Just also relied upon the passage not under the "The Claim" section but in the "Submissions" section of counsel's note of 25 March 2014. Mr Just contended that the Employment Judge addressed these issues correctly in paragraph 78 of the Judgment. He laid particular emphasis on the following: the point is not whether the Respondent should hold a

case conference but that it should consider the issue of disability before moving automatically to an ARM.

22. Based on those submissions, Mr Just for the Claimant submitted that the Tribunal correctly identified the PCP as being the broad problem of the Respondent's Managing Absence Policy, which then caused the Claimant to be subjected to an ARM rather than to an alternative and prior meeting which did not carry the threat of a written warning.

23. The importance of properly identifying the PCP cannot be emphasised too strongly. In section 15 of the **Equality Act 2010**, the treatment with which a Tribunal is concerned is the application of the PCP under section 15(1)(b). An Employment Tribunal must consider whether the Respondent has shown that the treatment as a result of the application of the PCP is a proportionate means of achieving a legitimate aim. Under section 20, the Employment Tribunal has to consider whether there has been a breach of duty by the Respondent to make reasonable adjustments. The steps which a Respondent is under a duty to take must depend on the particular PCP applied. In making the assessments, both under section 15 and section 20, there must be certainty as to that the PCP which is said by a Claimant was applied. Otherwise an Employment Tribunal cannot properly carry out the task of assessing whether the PCP has been shown by the Respondent to be a proportionate means of achieving a legitimate aim under one provision or whether, under section 20, the Respondent has failed to make reasonable adjustments in applying the PCP and whether reasonable steps were taken to avoid the substantial disadvantage to which a disabled person is put by the application of the PCP.

24. There is, in our judgment, uncertainty as to the PCP held by this Employment Tribunal to have been applied by the Respondent. There certainly was, in our judgment, a shift from the

PCP identified as an issue at the outset of the hearing and at the beginning of the Judgment in paragraph 5(b) and the decision taken on the PCP by the Employment Tribunal at paragraph 78. The "exemplification" was different from what had been identified as a PCP. The PCP which the Tribunal applied, which had not been previously identified as an issue, was the timing of the assessment to be made by the Respondent before progressing to an ARM. The PCP which ultimately was considered and applied by the Employment Tribunal is that in paragraph 78, namely that "there was a policy of arranging an ARM without having a case conference first" was not the PCP which had been identified as an issue at the outset of the hearing.

25. Accordingly we find that the Employment Tribunal erred by failing to decide the claim before them by considering the application by the Respondent of the PCP identified in the list of issues in paragraph 5(b). It has been held since **Chapman v Simon** [1994] IRLR 124 that an Employment Tribunal can only consider a claim made to them by the Claimant. It is important to have certainty for all parties as to being advanced and the claim which has to be met and, from the Employment Tribunal's point of view, the claim which is to be adjudicated by them.

26. So far as the second ground of appeal is concerned, the challenge to the approach of the Employment Tribunal to the question of justification of the discrimination arising from disability, it is incumbent upon an Employment Tribunal to make a proper and clear assessment of the proportionality between the discriminatory effect of the challenged provision and the need of the employer to proceed in the way that that employer has. That applies to both justification of a PCP and whether, under section 20, the employer had failed to take reasonable steps to make reasonable adjustments.

27. What is required when determining both issues is a critical evaluation of the relevant considerations. In **Hardy & Hansons plc v Lax** [2005] ICR 1565, the Court of Appeal emphasised the importance of that critical evaluation. See the Judgment of Pill LJ from paragraphs 28 to 34; but in particular in paragraph 33, in which Pill LJ referred to the appraisal of the competing requirements of the employer and the employee as being an appraisal requiring considerable skill and insight:

> **"33. … As this court has recognised in *Allonby* [2001] ICR 1189 and in *Cadman* [2005] ICR 1546, a critical evaluation is required and is required to be demonstrated in the reasoning of the tribunal. In considering whether the employment tribunal has adequately performed its duty, appellate courts must keep in mind, as did this court in *Allonby* and in *Cadman*, the respect due to the conclusions of the fact-finding tribunal and the importance of not overturning a sound decision because there are imperfections in presentation. Equally, the statutory task is such that, just as the employment tribunal must conduct a critical evaluation of the scheme in question, so must the appellate court consider critically whether the employment tribunal has understood and applied the evidence and has assessed fairly the employer's attempts at justification.**
>
> **34. The power and duty of the employment tribunal to pass judgment on the employer's attempt at justification must be accompanied by a power and duty in the appellate courts to scrutinise carefully the manner in which its decision has been reached. The risk of superficiality is revealed in the cases cited and, in this field, a broader understanding of the needs of business will be required than in most other situations in which tribunals are called upon to make decisions."**

28. The requirement for such a critical evaluation has recently received the high authority and reminder of the Supreme Court in **Aster Communities Ltd v Akerman-Livingstone (Equality and Human Rights Commission intervening)** [2015] 2 WLR 721. Reliance is placed by counsel for the Respondent on both authorities. It is submitted that the Employment Tribunal failed to make the critical evaluation required in order for an assessment to be made of the reasonableness of the measures taken by the employer and the justification for the PCP if a PCP were identified.

29. It said that the passages in the Tribunal's Judgment referring to justification, paragraphs 91 and 92, show that the Tribunal accepted that the employers had a legitimate aim in devising and implementing their Managing Attendance Policy because of the need to manage attendance and deal with attendance consistently under one policy. That aim, it is submitted, was accepted

as legitimate as is shown by the opening words of paragraph 92. Miss Darwin points to a passage in paragraph 91 of the Judgment in which the Tribunal referred to her "making various submissions in this respect that they were not challenged and that "we find that this was clearly a legitimate aim".

30. The Tribunal continued in paragraph 92:

> **"92 … There is no reason why the Respondent could not have considered [the disability issues] at an earlier meeting such as a return-to-work interview or a case consultation and to do so would have removed the unfavourable treatment that the Claimant was subject to. By contrast, doing this would in no way have impaired the Respondent's ability to carry out its aim of managing attendance and dealing with attendance consistently under one policy."**

31. Miss Darwin told us that there were submissions before the Tribunal as to the cost and practical difficulties in conducting an additional hearing before an ARM hearing, but unfortunately there are no findings of fact in that regard nor has any material been placed before us to show what material was before the Tribunal and which, it is said, they failed to take account.

32. Mr Just, quite rightly and properly, accepted that the Employment Tribunal should set out clearly the factors weighing on either side in considering whether a measure under the **Equality Act**, whether it be section 15 or section 20, is justified or reasonable and to show what the balancing exercise carried out by the Tribunal has been in reaching its conclusion. Although Mr Just was not present at the Tribunal hearing, he accepts that there was evidence led by the Respondent to show what the reasons were why they adopted the procedures that they did and the consequences for the Respondent of adopting another step in the procedure. Mr Just submitted that, because the Tribunal had such evidence before them, they must be taken as having had regard to such evidence in reaching their conclusions in paragraphs 91 to 92. Mr Just also rightly accepted that this balancing exercise to ascertain proportionality and

reasonableness is a very important step in determining claims under section 15 and section 20, as is shown in cases such as **Hardy's** and in **Aster**. However he contended that the Decision of the Tribunal should be upheld because the Tribunal should be taken as having undertaken that exercise.

33. We cannot accept that the Tribunal carried out the balancing exercise. That the factors on either side have to be set out is illustrated by **Hardy's** and has been emphasised in **Aster Communities Ltd**. Not only the Employment Tribunal but the appellate courts have to undertake that exercise. Those courts cannot do so without findings of fact which are relevant to the issue. No or insufficient such findings of fact were made in this case. Not only did the Employment Tribunal not set out the reason for their conclusion, but they did not set out the basis for it. It is essential that the Employment Tribunal set out the relevant facts that they have heard before them on either side in conducting the balancing exercise and, further, set out their reasoning in reaching the conclusion they reach. The importance of doing so is particularly the case in claims under section 15 and section 20 of the **Equality Act** where an appellate court may be invited, as we were at the conclusion of this hearing, to carry out their own exercise in determining the reasonableness of or justification for an employer's action. That is an impossible task where no or insufficient findings of fact have been made, as in this Decision.

34. Accordingly the appeal is allowed and the case is remitted to a differently constituted Employment Tribunal for rehearing.